

UNITED STATES OF AMERICA  
UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

STEVEN MARTIN ADAMS,

Petitioner,

Case No. 1:09-cv-114

v.

Honorable Robert J. Jonker

ALLEN L. BYAM,

Respondent.

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**OPINION**

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This is a habeas corpus action brought by a state prisoner under 28 U.S.C. § 2254. Promptly after the filing of a petition for habeas corpus, the Court must undertake a preliminary review of the petition to determine whether “it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court.” Rule 4, RULES GOVERNING § 2254 CASES; *see* 28 U.S.C. § 2243. If so, the petition must be summarily dismissed. Rule 4; *see Allen v. Perini*, 424 F.2d 134, 141 (6th Cir. 1970) (district court has the duty to “screen out” petitions that lack merit on their face). A dismissal under Rule 4 includes those petitions which raise legally frivolous claims, as well as those containing factual allegations that are palpably incredible or false. *Carson v. Burke*, 178 F.3d 434, 436-37 (6th Cir. 1999). After undertaking the review required by Rule 4, the Court will dismiss the petition without prejudice for failure to exhaust available state-court remedies.

## **Discussion**

### **I. Factual allegations**

At the time he filed his habeas application, Petitioner Steven Martin Adams was jailed at the Calhoun County Correctional Facility. Petitioner was convicted in 2006 of felonious assault, MICH. COMP. LAWS § 750.82, and possession of a firearm during the commission of a felony, MICH. COMP. LAWS § 750.227b. He was sentenced on those charges on September 11, 2006 to prison terms of twelve to forty-eight months and two years, respectively.

Petitioner appealed his convictions to the Michigan Court of Appeals, raising three issues: (1) he was deprived of a fair trial by prosecutorial misconduct; (2) his sentence for felonious assault violated state law; and (3) the assessment of \$400.00 for attorney fees was contrary to law, as the court failed to ascertain his ability to pay. On January 10, 2008, the court of appeals affirmed the conviction, but it remanded for resentencing and for a determination of whether attorney fees should be assessed against him. Petitioner sought leave to appeal in the Michigan Supreme Court, apparently alleging that counsel was ineffective in failing to raise a number of constitutional issues requested by Petitioner and in conspiring to suppress exculpatory evidence. The supreme court denied leave to appeal on May 27, 2008.

On February 25, 2008, on remand, the trial court sentenced Petitioner to a term of incarceration of six months on the felonious-assault offense and two consecutive years on the felony-firearm offense. Petitioner, through counsel, appealed his new sentence to the Michigan Court of Appeals. Counsel subsequently moved to withdraw from the case on the grounds that he found no non-frivolous basis for appeal. On July 10, 2008, the court of appeals granted the motion to withdraw and affirmed Petitioner's sentence. Counsel was directed to mail a copy of the trial

transcript to Petitioner within fourteen days and to file a proof of service with the court. The court stayed the judgment in the case for a period of 28 days, to permit Petitioner to raise any issue or question that he wished the court to consider, which would be considered by the court as a motion for reconsideration. On July 31, 2008, Petitioner sought reconsideration of the order, which the court denied on August 18, 2008. Petitioner did not seek leave to appeal to the Michigan Supreme Court.

In his application for habeas relief filed on or about February 11, 2009, Petitioner raises the following somewhat confusing issues:

- I. 5TH AMENDMENT/DOUBLE JEOPARDY/14TH AMEND DUE PROCESS/EQUAL PROTECTION 14TH STATE PROTECTED RIGHT/CONFRONTATION/6TH AMEND.
- II. FUNDAMENTAL FAIRNESS, FAILURE TO ALLOW ENTRAPMENT BY ESTOPPEL DEFENSE OR TO CALL FIRE ARMS INSTRUCT[O]R UNDER MCL 28.425J.
- III. FAILURE TO PROTECT, EQUAL PROTECTION/DUE PROCESS 14TH AMEND BY USING ARBITRARY INVIDIOUS PROCEDURE TO CONVICT.
- IV. 1ST AMENDMENT PETITION FOR RED[ ]RESS OF GRIEVANCES BY COMPLAINING ABOUT 12 BOOKING FEE, DISTRICT COURT 250.00 DEFACTO VICTIM MADE FALSE CLAIM MONTH BEFORE SECOND INCIDENT DISMISSED.

(Pet. at 6-10.) He alleges that he attempted to raise all of his habeas claims in state court, but appellate counsel “suppressed” the issues by not filing a 13-page brief sent to her by Petitioner.

## II. Exhaustion of State Court Remedies

Before the Court may grant habeas relief to a state prisoner, the prisoner must exhaust remedies available in the state courts. 28 U.S.C. § 2254(b)(1); *O’Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999). Exhaustion requires a petitioner to “fairly present” federal claims so that state courts have a “fair opportunity” to apply controlling legal principles to the facts bearing upon a petitioner’s

constitutional claim. *See O'Sullivan*, 526 U.S. at 842; *Picard v. Connor*, 404 U.S. 270, 275-77 (1971), *cited in Duncan v. Henry*, 513 U.S. 364, 365 (1995), and *Anderson v. Harless*, 459 U.S. 4, 6 (1982). To fulfill the exhaustion requirement, a petitioner must have fairly presented his federal claims to all levels of the state appellate system, including the state's highest court. *Duncan*, 513 U.S. at 365-66; *Silverburg v. Evitts*, 993 F.2d 124, 126 (6th Cir. 1993); *Hafley v. Sowders*, 902 F.2d 480, 483 (6th Cir. 1990). "[S]tate prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." *O'Sullivan*, 526 U.S. at 845. The district court can and must raise the exhaustion issue *sua sponte* when it clearly appears that habeas claims have not been presented to the state courts. *See Prather v. Rees*, 822 F.2d 1418, 1422 (6th Cir. 1987); *Allen*, 424 F.2d at 138-39.

Petitioner bears the burden of showing exhaustion. *See Rust v. Zent*, 17 F.3d 155, 160 (6th Cir. 1994). The grounds raised in the habeas application were not presented to the Michigan Court of Appeals on direct review. Petitioner nevertheless alleges that he has exhausted all of his claims because he sent a 13-page brief to his appellate attorney, but the attorney failed to file the brief. Regardless of why the brief was not filed, however, there is no question that the state courts have not yet had the opportunity to review the claims raised in Petitioner's habeas application. Because the state courts have not had one full opportunity to resolve the issues, the claims are unexhausted. *O'Sullivan*, 526 U.S. at 845.

An applicant has not exhausted available state remedies if he has the right under state law to raise, by any available procedure, the question presented. 28 U.S.C. § 2254(c). Petitioner has at least one available procedure by which to raise the issues he has presented in this application. He may file a motion for relief from judgment under MICH. CT. R. 6.500 *et seq.* Under Michigan law,

one such motion may be filed after August 1, 1995. MICH. CT. R. 6.502(G)(1). Petitioner has not yet filed his one allotted motion. Therefore, the Court concludes that he has at least one available state remedy.

Petitioner's application is subject to the one-year statute of limitations provided in 28 U.S.C. § 2244(d)(1). Under § 2244(d)(1)(A), the one-year limitation period runs from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." Petitioner appealed his conviction to the Michigan Court of Appeals and Michigan Supreme Court. After the case was remanded for resentencing, Petitioner appealed his new sentence to the Michigan Court of Appeals but not to the Michigan Supreme Court. The Michigan Court of Appeals denied Petitioner's motion for rehearing on August 18, 2008. Where a petitioner has failed to pursue an avenue of appellate review available to him, the time for seeking review at that level is counted under § 2244(d)(1)(A). *See* 28 U.S.C. § 2244(d)(1)(A) (time for filing a petition pursuant to § 2254 runs from "the date on which the judgment became final by the conclusion of direct review *or the expiration of time for seeking such review.*" ) (emphasis added). However, such a petitioner is not entitled to also count the 90-day period during which he could have filed a petition for certiorari to the United States Supreme Court. *See United States v. Cottage*, 307 F.3d 494, 499 (6th Cir. 2002) (holding that, in the context of a motion under 28 U.S.C. § 2255, where a petitioner has failed to file a direct appeal to the court of appeals, the time for filing a petition does not include the ninety-day period for seeking certiorari in the United States Supreme Court because no judgment exists from which he could seek further review in the United States Supreme Court); *United States v. Clay*, 537 U.S. 522, 530-31(2003) (holding that finality is analyzed the same under §§ 2244(d)(1)(A) and 2255). Here, since the Supreme Court will review only final judgments of the "highest court of a state in which a decision could be had . . . ," 28 U.S.C. §

1257(a), the decision must be considered final at the expiration of the 56-day period for seeking review in the Michigan Supreme Court. *Roberts v. Cockrell*, 319 F.3d 690, 694-95 (5th Cir. 2003); *Kapral*, 166 F.3d at 577; *Ovalle v. United States*, No. 02-1270, 2002 WL 31379876 at \*2 (6th Cir. Oct. 21, 2002) (citing *Wims v. United States*, 225 F.3d 186, 188 (2d Cir. 2000)). Petitioner's conviction therefore became final on Monday, October 13, 2008. Accordingly, absent tolling, Petitioner would have one year, until October 13, 2009, in which to file his habeas petition.

In *Palmer v. Carlton*, 276 F.3d 777, 781 (6th Cir. 2002), the Sixth Circuit held that when the dismissal of a “mixed”<sup>1</sup> petition could jeopardize the timeliness of a subsequent petition, the district court should dismiss only the unexhausted claims and stay further proceedings on the remaining portion until the petitioner has exhausted his claims in the state court. The Court indicated that thirty days was a reasonable amount of time for a petitioner to file a motion for post-conviction relief in state court, and another thirty days was a reasonable amount of time for a petitioner to return to federal court after he has exhausted his state-court remedies.<sup>2</sup> The instant case does not present a mixed petition because none of the issues raised in the petition are exhausted. It is unclear whether *Palmer* applies to a “non-mixed” petition. Assuming *Palmer* applies, Petitioner has far more than sixty days remaining in the limitations period, and, thus, he is not in danger of running afoul of the statute of limitations so long as he diligently pursues his state court remedies. Therefore, a stay of these proceedings is not warranted.

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<sup>1</sup>A “mixed petition” is a habeas corpus petition that contains both exhausted and unexhausted claims.

<sup>2</sup>The running of the statute of limitations is tolled when “a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending.” 28 U.S.C. § 2244(d)(2).

### **Conclusion**

For the foregoing reasons, the Court will dismiss the petition for failure to exhaust available state-court remedies.

### **Certificate of Appealability**

Under 28 U.S.C. § 2253(c)(2), the Court must determine whether a certificate of appealability should be granted. A certificate should issue if Petitioner has demonstrated a “substantial showing of a denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). This Court’s dismissal of Petitioner’s action under Rule 4 of the Rules Governing § 2254 Cases is a determination that the habeas action, on its face, lacks sufficient merit to warrant service. It would be highly unlikely for this Court to grant a certificate, thus indicating to the Sixth Circuit Court of Appeals that an issue merits review, when the Court already has determined that the action is so lacking in merit that service is not warranted. *See Love v. Butler*, 952 F.2d 10 (1st Cir. 1991) (it is “somewhat anomalous” for the court to summarily dismiss under Rule 4 and grant a certificate); *Hendricks v. Vasquez*, 908 F.2d 490 (9th Cir. 1990) (requiring reversal where court summarily dismissed under Rule 4 but granted certificate); *Dory v. Comm’r of Corr. of the State of New York*, 865 F.2d 44, 46 (2d Cir. 1989) (it was “intrinsically contradictory” to grant a certificate when habeas action does not warrant service under Rule 4); *Williams v. Kullman*, 722 F.2d 1048, 1050 n.1 (2d Cir. 1983) (issuing certificate would be inconsistent with a summary dismissal).

The Sixth Circuit Court of Appeals has disapproved issuance of blanket denials of a certificate of appealability. *Murphy v. Ohio*, 263 F.3d 466 (6th Cir. 2001). Rather, the district court must “engage in a reasoned assessment of each claim” to determine whether a certificate is warranted. *Id.* at 467. Each issue must be considered under the standards set forth by the Supreme

Court in *Slack v. McDaniel*, 529 U.S. 473 (2000). *Murphy*, 263 F.3d at 467. Consequently, this Court has examined each of Petitioner's claims under the *Slack* standard.

This Court denied Petitioner's application on the procedural ground of lack of exhaustion. Under *Slack*, 529 U.S. at 484, when a habeas petition is denied on procedural grounds, a certificate of appealability may issue only "when the prisoner shows, at least, [1] that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and [2] that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Both showings must be made to warrant the grant of a certificate. *Id.* The Court finds that reasonable jurists could not debate that this Court correctly dismissed the petition on the procedural ground of lack of exhaustion. "Where a plain procedural bar is present and the district court is correct to invoke it to dispose of the case, a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petitioner should be allowed to proceed further." *Id.* Therefore, the Court denies Petitioner a certificate of appealability.

A Judgment consistent with this Opinion will be entered.

Dated: June 5, 2009

/s/ Robert J. Jonker  
ROBERT J. JONKER  
UNITED STATES DISTRICT JUDGE